Supreme Court, U.S.
FILED
MAR 18 1996
CLERK

No. 95-959

In The

Supreme Court of the United States

October Term, 1995

640 BROADWAY RENAISSANCE CO.,

Petitioner,

vs.

JOHN EISNER, *et al.* and 15 Other Cases Consolidated for Purposes of a Joint Appeal,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Judicial Department

RESPONDENTS' BRIEF IN OPPOSITION

DAVID RATNER
Counsel of Record
HARTMAN, ULE, ROSE
& RATNER
Attorneys for Respondents
305 Broadway, Suite 1201
New York, New York 10007
(212) 437-9110

8497
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction to grant a writ of certiorari in this case where petitioner raised no federal question of any kind in the state court proceedings.

2. Whether the Court ought to grant a writ of certiorari in light of the fact that all of the constitutional issues raised in the petition were decided against petitioner in a previous federal court action entitled *640 Broadway Renaissance Co. v. Cuomo*, 740 F. Supp. 1023 (S.D.N.Y. 1990), *aff'd*, 927 F.2d 593 (1991), *cert. denied*, 500 U.S. 933, 111 S. Ct. 2054, 114 L. Ed. 2d 459 (1991).

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PRELIMINARY STATEMENT

Respondents submit this brief in opposition to the petition of 640 Broadway Renaissance Co. for a writ of certiorari. As will be shown, the petition, which is replete with misstatements of fact and law, must be denied, because at no stage of the state court proceedings did petitioner raise any federal questions. Moreover, the constitutional issues identified in the instant petition were addressed and rejected by this Court in *Spring Realty Co. v. New York City Loft Board*, 127 Misc. 2d 1090, 487 N.Y.S. 2d 973 (Sup. Ct., N.Y. Co. 1985), *aff'd*, 117 A.D. 2d 1029, 498 N.Y.S. 2d 241 (1st Dep't 1986), *aff'd as modified on other grounds*, 69 N.Y. 2d 657, 511 N.Y.S. 2d 830, 503 N.E. 2d 1367 (1986), *appealed dismissed for want of a substantial federal question*, 482 U.S. 911, 107 S. Ct. 3179, 96 L. Ed. 2d 668 (1987). Indeed, petitioner raised the identical issues in a federal court action which was dismissed on the ground that the *Spring Realty* case constituted a binding precedent. *See 640 Broadway Renaissance Co. v. Cuomo*, 740 F. Supp. 1023 (S.D.N.Y. 1990), *aff'd*, 927 F.2d 593 (1991), *cert. denied*, 500 U.S. 933, 111 S. Ct. 2054, 114 L. Ed. 2d 459 (1991).

STATEMENT OF FACTS

By the instant petition, 640 Broadway Renaissance Co. seeks review of an order of the Appellate Division, First Department, of the Supreme Court of the State of New York which, *inter alia*, affirmed 16 orders of the Supreme Court, New York County, granting summary judgment to respondents. Except for minor factual differences, all of the motions were the same and involved identical questions of law.

Petitioner, 640 Broadway Renaissance Co., is the fee owner and landlord of premises known as 640 Broadway, New York, New York (hereafter, the "Building"). The Building is a nine-

story structure containing various commercial units on the ground floor and twenty residential units on the second through ninth floors. Temple Smith, Maureen Albert-Eisner, John Eisner, Robert Rossitor, Leslie Holtan, Loren Calaway, Richard Yoder, Charles Searles, Kathleen Spicer, Rafael Barrios, Juliet Holland, Joel Hinman, Hanna Eschel, Brandon Krall, Kenneth Delap, Nancy Hoffman, Ruth Holloman, Kim Steele, Rina Peleg, Donna Goodman and Marie-Paule Fauque (the "Respondents") were, at the commencement of the lawsuit, all residential tenants who were determined by the New York City Loft Board to be entitled to the protections of Article 7-C of the Multiple Dwelling Law[1] (hereafter referred to as the "Loft Law"). The remaining defendants in the underlying action are either former tenants or occupants of various units in the Building, trade names under which various tenants have operated businesses or persons unknown to Respondents.

The Building is located on the corner of Broadway and Bleecker Streets, an area designated under the New York City Zoning Resolution (the "ZR") as M1-5B. The Building has a certificate of occupancy, issued on May 17, 1966, which permits solely commercial and manufacturing uses. The structure occupies approximately 5,000 square feet (R-702-5).[2] According to ZR § 42-14(D)(1)(b), a building on Broadway — like the instant premises — with a lot coverage exceeding 3,600 square feet in an M1-5B zoning district may be converted to residential use for joint living-work quarters for artists upon approval by the City Planning Commission of a special permit

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1. Excerpts from that determination are annexed to the petition for a writ of certiorari (the "Petition") as Appendix P (pages 83a-106a).

2. References to the record below are indicated by "R" followed by the appropriate page number.

filed pursuant to § 74-782 of the Zoning Resolution.[3] On or about June 3, 1982, Martin R. Fine, on behalf of petitioner, filed such a special permit application with the New York City Planning Commission for permission to convert floors two through nine at 640 Broadway to joint living-working quarters for artists (R-724-40).

A. Statutory Background

On June 21, 1982, the New York State Legislature enacted Multiple Dwelling Law ("MDL") §§ 280-287 (Chapter 349 of the Laws of 1982) in response to a pressing public emergency created by the unregulated conversion of loft space in New York City from commercial to residential use without compliance with applicable building codes and laws regarding minimum health and safety standards. *See* MDL § 280. A succinct statement of the remedial purposes of the Loft Law is provided by the Appellate Division of the New York State Supreme Court, First Department, in *Vlachos v. New York City Loft Board*, 118 A.D. 2d 378, 504 N.Y.S. 2d 649 at 651 (1st Dep't 1986):

> Multiple Dwelling Law article 7-C (Secs. 280-287, the "Loft Conversion Law") was enacted (L. 1982, c. 349, sec. 1) to alleviate the serious housing shortage in New York City and the dangerous living conditions

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3. Under the Zoning Resolution, "joint living-work quarters for artists" and "special permit" are terms of art. "Joint living-work quarters for artists", defined at ZR § 12-10, is a category of dwelling allowed in an otherwise nonresidential building. A "special permit" is a procedure by which the New York City Planning Commission may, upon a specified application, permit conversion to residential use — including, specifically, joint living-work quarters for artists — in M1-5B zones. The procedures for special permits are set out at ZR § 74-78 *et seq.*

> created in part by the illegal conversion of commercial and manufacturing loft buildings to residential use without compliance with applicable building codes and laws including local housing maintenance standards. The law sought to prevent the "great hardship" that would occur if tenants were forced to relocate because of their uncertain status in these illegally converted buildings.

To abate this public emergency, the Loft Law requires subject owners to bring their buildings up to code as class A multiple dwellings within a specified timetable set out at MDL § 284. In an effort to balance the equities between landlords and tenants, the cost of legalization, initially borne by the owners, is passed along to protected tenants in the form of rent increases pursuant to a formula established at MDL § 285(5). Once the building achieves code compliance, protected units are then made subject to the Rent Stabilization Law (MDL § 286[3]).

MDL § 285(1) permits an owner to collect rent during the legalization process, but only on condition that the owner register the building with the Loft Board and comply with the legalization timetables of MDL § 284. Owners who might suffer unjustifiable hardship because of the cost of legalization were given the opportunity to gain exemption from the Loft Law by filing a hardship application with the New York City Loft Board within nine months of establishment of the Loft Board.[4] The Loft Law defines "unjustifiable hardship" as either an inability to make a "reasonable return on the owner's investment" or the necessity, upon conversion of the building to residential use, for

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4. Pursuant to MDL §282, the Mayor of the City of New York was given 90 days from the effective date of the Loft Law to establish the Loft Board. Consequently, the deadline for the filing of a hardship exemption was set at June 30, 1983. Loft Board Hardship Regulations § 2-03(a)(2)(i).

displacement of conforming-use commercial tenants. *See* MDL § 285(2).[5]

In order to identify buildings subject to the Loft Law, the Legislature established a category of buildings called "interim multiple dwellings". The Legislature defined interim multiple dwellings in § 281 of the MDL as any building or portion of a building located in a city of more than one million persons which:

(a) at any time was occupied for manufacturing, commercial or warehouse purposes;

(b) lacks a certificate of occupancy pursuant to § 301 of the MDL[6];

(c) was occupied for residential purposes by three or more families living independently of one another during the period April 1, 1980 through December 1, 1981[7]; and

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5. At footnote 8 on page 9 of the Petition, petitioner disingenuously alleges that it was prevented from filing a hardship exemption, because the New York City Loft Board did not determine the question of coverage of the building until 1988. In fact, the Loft Law and the New York City Loft Board Rules and Regulations allow an owner to file a hardship application and contest coverage at the same time. Moreover, the record is clear that petitioner was aware of its obligations under the Loft Law well before the June 30, 1983 hardship deadline, since it attempted to register the building with the Loft Board in January, 1983 (R-560-9).

6. A certificate of occupancy pursuant to MDL § 301 is a certificate which authorizes residential use of three or more dwellings in a building. Because 640 Broadway's certificate of occupancy allows only commercial use, the Building "lacks a certificate of...occupancy pursuant to § 301" (MDL §281[1][ii]), and therefore, qualifies for Loft Law coverage.

7. The purpose of this requirement is to ensure that the Loft Law only (Cont'd)

(d) is located in a zoning area which permits residential use either as of right, by special permit, administrative certification or any other means other than a zoning variance.

The Loft Law is administered by an agency known as the New York City Loft Board. MDL § 282. Every owner of an interim multiple dwelling was required to file, within sixty days of the effective date of the statute, a registration statement with the New York City Loft Board setting forth information required under MDL § 325 (the statute which sets out registration requirements for multiple dwellings) as well as additional information as required by regulations promulgated by the Loft Board. *See* MDL § 284(2).

B. Petitioner's Actions Under the Loft Law

Petitioner's involvement with the Loft Law is a chronicle of deliberate intransigence calculated to frustrate the letter and purpose of the statute. Petitioner's actions — and inaction — reveal not only a callous indifference to Respondents' rights, but petitioner's thorough understanding of the legal obligations imposed by the Loft Law, coupled with a studied determination to ignore those obligations.

On or about January 31, 1983, within the applicable time limit for registration, petitioner filed an application to register the Building as an interim multiple dwelling with the New York City Loft Board (R-563-4). According to an attachment to the

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(Cont'd)
applies to buildings which had been *illegally* converted from residential to commercial use. This is accomplished by restricting coverage to buildings which were, in fact, occupied by three or more families, but had a certificate of occupancy which allowed either no residential use (as is the case at 640 Broadway) or residential use by less than three families.

application, the application was filed "UNDER PROTEST AND UNDER DURESS" (R-564).

By letter dated March 7, 1983, the Loft Board notified petitioner that it was rejecting the registration application as incomplete, since it did not contain information required by Loft Board regulations, including the names of each of the general partners of 640 Broadway Renaissance Co., a 24-hour phone number for emergency repairs and copies of leases for individual units in the Building (R-565-6).

In response, Martin R. Fine, on letterhead identifying himself as petitioner's attorney[8], wrote to the Loft Board, stating, *inter alia*, that he did "not believe that you have any right to any further information other than the name of the owner and the registered managing agent as previously set forth in the application" (R-567-8). In addition, Mr. Fine claimed that the request for copies of all leases in the Building was "an unlawful and unconstitutional invasion of privacy". Mr. Fine further threatened:

> IN THE EVENT AN INTERIM MULTIPLE DWELLING REGISTRATION NUMBER IS NOT IMMEDIATELY ISSUED, the undersigned has been instructed to immediately commence legal proceedings to require the issuance of said Interim Multiple Dwelling Registration number as provided by law.

Counsel to the New York City Loft Board answered Mr. Fine in a letter dated April 11, 1983, informing him that no registration

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8. This is the same attorney representing 640 Broadway Renaissance Co. in the instant petition for a writ of certiorari.

number would be issued for the Building until the requested information was supplied (R-569). Subsequently, petitioner took no further action to register the Building (or comply in any other way with the Loft Law) until August 1991 (R-696).

Because of petitioner's refusal to register the Building with the Loft Board and otherwise comply with the health and safety requirements of the Loft Law, various residential tenants of the Building filed an application on August 6, 1983 with the New York City Loft Board for a determination that 640 Broadway was an interim multiple dwelling.[9] Pursuant to that application, the agency conducted a 25-day hearing in which the tenants called 27 witnesses and submitted over 250 exhibits (R-524). In its decision after the hearing (R-522-60), the Loft Board confirmed that the Building was an interim multiple dwelling subject to all the requirements of the Loft Law. The Loft Board also specifically found that petitioner not only knew that the premises were all along being used for residential purposes, but that petitioner and its employees actively encouraged Respondents to live in their lofts:

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9. Petitioner makes much of the fact that the Loft Board did not designate the building as an interim multiple dwelling until 1988. Petitioner thereby suggests that the onus was on the Loft Board or the tenants to place the building within the jurisdiction of the Loft Board. The *exact* opposite is the case. MDL § 282 clearly defines what buildings are subject to the law, and MDL § 282 unequivocally requires owners to register their buildings within 60 days of the effective date of the Loft Law. It was petitioner's obdurate refusal to perform this obligation which prompted the tenants to apply to the Loft Board for a determination of Loft Law coverage. The point is not a minor one, in light of petitioner's attempt to portray itself as having been foreclosed from taking advantage of various Loft Law deadlines. The Loft Board's determination of coverage (R-522-62) makes clear that petitioner was dragged kicking and screaming down the path of Loft Law compliance. Indeed, to this day, without explanation or excuse, petitioner has not legalized the Building as a class A multiple dwelling.

> Behind the bluster of the owner's voluminous constitutional and procedural challenges to coverage lies the indisputable fact that the owner's conduct and statements, from 1978 when it purchased the building until at least 1982, expressly recognized the residential use of the upper eight floors. During this time, according to the credible and unrebutted testimony of nearly all the tenants, the owner was leasing for "lofts" and even had some tenants (especially Ms. Eschel) fill out application forms asking about roommates and pets, hardly items of concern for a commercial tenancy. At the same time the owner's employees were personally assuring tenants that it was not only acceptable but preferable for them to live in the building, going so far as to approve floor plans for kitchens and bathrooms, recommend electricians and plumbers, and help procure homeowner's insurance.[10]

(Petition, Appendix P at 99a).

The determination of the New York City Loft Board establishing that Respondents are statutory tenants was made on April 28, 1988. Petitioner never appealed the determination, and

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10. This is an area in which the petitioner has misled this Court. All of petitioner's statements in its Petition are carefully constructed to suggest, without actually stating, that petitioner rented all the units in the Building to commercial tenants (*see, e.g.*, Petition at 5-6). Nevertheless, what petitioner omits to inform the Court is that all 16 Respondents, to petitioner's knowledge, were residential tenants who made clear that they intended to live in their units. As the Loft Board found, notwithstanding the form of the leases, petitioner not only condoned, but encouraged respondents to live in their lofts.

the statute of limitations for such an appeal has long since expired. New York State Civil Practice Law and Rules ("CPLR") § 217.

Notwithstanding the indisputable fact that the Building has been subject to the Loft Law since June 21, 1982,[11] Petitioner steadfastly refused to register the Building, comply with the legalization requirements of the Loft Law or even recognize Respondents as tenants. Although MDL § 284 requires Loft Law buildings to have been brought up to code as class A multiple dwellings by June 21, 1985, at the time of the last rents sought in the underlying action (August, 1992), petitioner had not lifted a finger to legalize 640 Broadway. In fact, petitioner's only legalization action to that time was to take a giant step backward by withdrawing its 1982 City Planning Commission application for a special permit to convert the Building to joint living-work quarters for artists. Petitioner took this step in July 1985, during the course of its losing efforts at the Loft Board coverage hearings. Apparently, as it become clear to petitioner that it would have to legalize the Building as a class A multiple dwelling, petitioner withdrew the special permit application in order to create further impediments to legalization. (*See* footnote at R-525 and R-747-9).

Other than the withdrawal of its special permit application, petitioner did not even claim to have performed a single act in connection with the legalization of the Building from the date the Loft Law was enacted (June 21, 1982) through the date of the last rents sought in the underlying action (August 31, 1992).[12]

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11. Section 3 of Ch. 349 of L. 1982 provides that the Loft Law shall "take effect immediately" on June 21, 1982.

12. Petitioner contends at page 4 of the Petition that "it was uncontroverted that (a) 640 Broadway is not structurally suited to serve as a residential (Cont'd)

C. The Underlying Actions

In 1988, five years after the Loft Law was enacted and three years after the building was required to have been fully legalized as a class A multiple dwelling (*see* MDL § 284[1][i][D]), Respondents began to withhold their rent in an effort to force petitioner to undertake its statutory duty to bring the building up to code (R-519-20). Nevertheless, it was not until four years later, with the commencement of the instant actions in October, 1992, that petitioner took any steps to collect its rent.

In the complaints (R-137-243), petitioner asserted three causes of action. The first cause of action was for rent "through and including August 31, 1992" (*see, e.g.*, R-139-40); the second cause of action was for attorneys' fees (*see, e.g.*, R-140-1); and the third cause of action was for "indemnification" based on Respondents' activities which, according to petitioner, had the effect of "subjecting the premises to the provisions of the Loft Law" (*see, e.g.*, R-141-2).

At about the same time, petitioner also commenced summary non-payment proceedings against Respondents in the Housing Part of Civil Court for current rent, beginning with September, 1992 (R-516, n. 6, R-637).

D. The Motions Under Appeal

By notices dated January 6, 1993 (*see, e.g.*, R-509-10), Respondents moved pursuant to CPLR Rule 3212 for summary judgment dismissing the complaints on the ground that MDL

(Cont'd)
'multiple dwelling'. . . and (b) up to Two Million Dollars ($2,000,000) would have to be expended to reconstruct this building to convert it into a multiple dwelling . . ." If these claims are uncontroverted, it was because petitioner never made any such allegations in the courts below.

§ 302(1)(b) barred petitioner from collecting rent during the periods sought in the instant actions when petitioner was in violation of its legalization obligations under MDL §§ 284(1) and 301(1).

In opposition, petitioner argued that amendments to the Loft Law enacted pursuant to Chapter 227 of the Laws of 1992 were intended to be retroactively applied such that petitioner could collect rents for periods when it had defiantly refused to comply with the Loft Law's legalization timetable. Petitioner also made the audacious argument that its own deliberate withdrawal of the special permit application tolled (and, presumably, to this day continues to toll) the Loft Law's original legalization timetable, so that petitioner has never been out of compliance with its code compliance obligations.[13] Significantly, Petitioner raised no federal question of any kind in the motion.

Petitioner also cross-moved for orders (a) striking Respondents' answers or, alternatively, vacating the automatic stay of discovery pursuant to CPLR 3214(b); (b) sanctioning Respondents for their allegedly willful failure to submit to disclosure; (c) granting petitioner leave to amend its complaints to add a cause of action for constructive trust; (d) granting petitioner leave to amend its replies; and (e) directing Respondents to pay use and occupancy prospectively during the course of the action (*see, e.g.*, R-617-8).

The motions and cross-motions were disposed of by decision dated July 12, 1993, pursuant to which Justice Joan B. Lobis granted Respondents' motion for summary judgment and

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13. This argument is in marked contrast to petitioner's position here, where petitioner claims that it did "not want or need" a special permit but was forced to apply for one under penalties provided by the Loft Law (Petition at 3). In fact, petitioner applied for a special permit *before* the Loft Law was enacted and withdrew the application in response to the Loft Law.

denied petitioner's cross-motions in all respects (the decision is annexed as Appendix C to the Petition at 5a-11a). Justice Lobis determined that there were no triable issues of fact, since it was clear that petitioner had taken no action to meet its legalization obligations under the Loft Law until September, 1992, which was after the last rents claimed in the complaints. Justice Lobis further recognized the fallacy of petitioner's argument that the withdrawal of its own special permit application had relieved petitioner of the obligation to legalize the building:

> Plaintiff's argument that it was in compliance with the provisions of the Loft Law prior to the amendments is rejected. According to plaintiff, the statutory timetables originally set forth in the Loft Law did not take effect until plaintiff obtained a special permit. Since plaintiff never obtained a special permit, it claims it has always been in compliance with the Loft Law. What plaintiff fails to acknowledge in its argument is that the only reason plaintiff never obtained a special permit for the building was that plaintiff withdrew it application for a special permit. . . .The Loft Law specifically provides that a landlord "shall take all reasonable and necessary action to obtain a certificate of occupancy as a Class A multiple dwelling" within three years of the effective date of the Loft Law. Here, plaintiff violated the foregoing provision of the Loft Law by failing to pursue and actually withdrawing its application for a special permit.

(Petition, Appendix at 9a).

Similarly, Justice Lobis rejected petitioner's contention that the 1992 amendments to the Loft Law were intended to be retroactively applied to allow owners to collect rents during periods when they were not in compliance with the Loft Law's original legalization timetable. On this point, Justice Lobis cited her own holding in *Grossman v. M.K.F. Realty Corp.*, 155 Misc. 2d 841, 590 N.Y.S. 2d 1011 (Sup. Ct., N.Y. Co. 1992), a case which, subsequent to the decision in the instant actions, was affirmed by the Appellate Division, First Department, at 203 A.D. 2d 129, 610 N.Y.S. 2d 247 (1994). In her decision, Justice Lobis neither discussed, nor resolved, any federal questions.

Orders were entered pursuant to Judge Lobis' decision on November 15, 1993 (R-9-56).

Petitioner appealed Judge Lobis' decision to the Appellate Division of the Supreme Court of the State of New York. Once again, petitioner raised no federal questions. That appeal was decided by an order entered with the Clerk of the Court on February 7, 1995 (annexed as Appendix B to the Petition at 3a-4a) affirming the orders of the Court below. In its decision, the Court neither discussed nor resolved any federal questions.

Petitioner then moved for leave to appeal to the Court of Appeals. In its motion papers, petitioner, for the first time, raised a constitutional question, but the question was whether the Loft Law offended the Constitution of the State of New York, *not* the United States Constitution. That motion was denied by order of the Court of Appeals dated September 7, 1995 (annexed as Appendix A to the Petition).

REASONS FOR DENYING THE WRIT

I.

PETITIONER NEVER RAISED ANY FEDERAL QUESTION IN THE STATE COURT PROCEEDINGS.

At no time did petitioner *ever* assert any federal question of any kind during the state court proceedings. Neither at the trial level, at the Appellate Division, nor at the Court of Appeals, did petitioner assert any right under the United States Constitution or under any law of the United States. In addition, none of the Courts involved passed on any federal question. Consequently, under 28 U.S.C. § 1257, the Supreme Court of the United States is without jurisdiction to review the state court judgment in this case.

II.

ALL OF THE CONSTITUTIONAL ISSUES RAISED IN THE PETITION HAVE BEEN PASSED UPON BY THE FEDERAL COURTS, INCLUDING THE SUPREME COURT OF THE UNITED STATES.

This is not the first time that petitioner has raised the same constitutional questions regarding the Loft Law and its application to the very building at issue in the instant case. In *640 Broadway Renaissance Co. v. Cuomo*, 740 F. Supp. 1023 (S.D. N.Y. 1990), *aff'd*, 927 F.2d 593 (1991), *cert. denied*, 500 U.S. 993, 111 S. Ct. 2054, 114 L. Ed. 2d 459 (1991), petitioner brought a federal court action regarding the building located at 640 Broadway, and, *inter alia*, requested a declaration that the Loft Law was unconstitutional. In his decision dismissing the complaint, the District Court Judge painstakingly analyzed all of the constitutional issues — the exact same constitutional issues

presented here — and found that they were insubstantial or had been rejected by the Supreme Court of the United States in *Spring Realty Co. v. New York City Loft Board*, 127 Misc. 2d 1090, 487 N.Y.S. 2d 933 (Sup. Ct., N.Y. Co. 1985), *aff'd*, 117 A.D. 2d 1029, 498 N.Y.S. 2d 241 (1st Dep't 1986), *aff'd as modified on other grounds*, 69 N.Y. 2d 657, 511 N.Y.S. 2d 830, 503 N.E. 2d 1367 (1986), *appealed dismissed for want of a substantial federal question*, 482 U.S. 911, 107 S. Ct. 3179, 96 L. Ed. 2d 668 (1987).

III.

PETITIONER IS MISTAKEN IN CLAIMING THAT THE LOFT LAW WAS RETROACTIVELY APPLIED TO DEPRIVE PETITIONER OF ITS RENTS.

Petitioner argues that the Loft Law was somehow retroactively applied to deprive petitioner of its rents at 640 Broadway. Petitioner's analysis of the law is entirely incorrect. In fact, the Loft Law was intended to have the opposite effect: to allow petitioner to collect rent which it otherwise would have been barred from collecting.

Long before the Loft Law was enacted, and long before petitioner acquired title to the Building, the New York State Multiple Dwelling Law prohibited an owner from collecting rent in a building which contained residential tenants in violation of the building's certificate of occupancy. Thus, MDL § 301(1) provides in relevant part:

> No multiple dwelling[14] shall be occupied in

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14. A "multiple dwelling" is defined at MDL § 4 as "a dwelling which is either rented, leased, let or hired out, to be occupied, or is occupied as the residence or home of three or more families living independently of each other".

> whole or in part until the issuance of a certificate by the department that said dwelling conforms in all respects to the requirements of this chapter, to the building code and rules and to all other applicable law . . .

The penalties for violation of MDL § 301(1) were in existence for decades before the Loft Law was enacted. Those penalties are at § 302(1)(b), and to the extent relevant here, provide:

> If any dwelling or structure be occupied in whole or in part for human habitation in violation of section three hundred one, during such unlawful occupation . . . [n]o rent shall be recovered by the owner of such premises for said period, and no action or special proceeding shall be maintained therefor, or for possession of said premises for non-payment of such rent.

Before and after enactment of the Loft Law, the Courts of New York State repeatedly applied MDL §§ 301 and 302 to bar owners who failed to obtain proper certificates of occupancy from maintaining any action or proceeding to recover rents from their tenants. *Hornfeld v. Gaare*, 130 A.D. 2d 398, 515 N.Y.S. 2d 258 (1st Dep't 1987); *Baum Residence Corp. v. Van Rosson*, 206 Misc. 315, 134 N.Y.S. 2d 302 (App. Term 1st Dep't 1954); *Carmel v. Appleton*, 122 N.Y.S. 2d 195 (App. Term 1st Dep't 1953); *Guarino v. Timares*, 196 Misc. 414, 94 N.Y.S. 2d 262 (App. Term 2nd Dep't 1949), *appeal denied*,, 276 A.D. 847, 93 N.Y.S. 2d 734 (2nd Dep't 1949); *40 Clinton Street Associates v. Dolgin*, 126 Misc. 2d 373, 481 N.Y.S. 2d 960 (Civ. Ct. N.Y. Co. 1984); *Ying Lung Corp. v. Medrano*, 123 Misc. 2d 1074, 475

N.Y.S. 2d 772 (Civ. Ct. N.Y. Co. 1984); *Waters v. Panzella*, 100 N.Y.S. 2d 214 (Mun. Ct. Queens Co. 1950).

The Loft Law, far from preventing petitioner from collecting rents at 640 Broadway, actually provided petitioner an opportunity to avoid the penalties of § 302(1)(b). Thus, the Loft Law at MDL § 285(1) provides:

> Notwithstanding the provisions of section three hundred two or three hundred twenty-five of this chapter, the owner of an interim multiple dwelling may recover rent payable from residential occupants qualified for the protection of this article on or after April first, nineteen hundred eighty, and maintain an action or proceeding for possession of such premises for non-payment of rent, *provided that he is in compliance with this article.*

(Emphasis added).

Thus, as can be seen, the Loft Law *enables* an owner, who would otherwise be foreclosed by MDL § 302(1)(b) from collecting rent, the opportunity to collect and sue for such rent on condition that it abide by the legalization and registration requirements of the Loft Law. *See, e.g., County Dollar Corp. v. Douglas*, 160 A.D. 2d 537, 161 A.D. 2d 370, 556 N.Y.S. 2d 533 (1st Dep't 1990).

The fact that petitioner could not collect rent in the underlying action has nothing to do with penalties provided by the Loft Law, and every thing to do with petitioner's deliberate intransigence in taking advantage of the opportunities afforded by the Loft Law.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

DAVID RATNER
Counsel of Record
HARTMAN, ULE, ROSE
& RATNER
Attorneys for Respondents
305 Broadway, Suite 1201
New York, N.Y. 10007
(212) 437-9110